NO. 83-498

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

*Appellants,*

*v.*

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

*Appellees.*

**On Appeal from the United States Court of Appeals for the Third Circuit**

## BRIEF FOR APPELLANTS

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Dated: January, 1984

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## Question Presented

Whether the State of New Jersey, as part of a larger regulatory scheme whose purpose is to strictly and effectively control its sensitive and vulnerable casino industry, can require, consistent with federal labor policy, the registration of only those labor unions representing employees of operating casino hotels in Atlantic City and the removal from office in those specific unions of certain individuals who, after a formal hearing, are found disqualified by reason of certain statutorily-proscribed conduct, including enumerated criminal convictions and involvement with organized crime, which conduct would not necessarily disqualify union officials under federal labor law.[1]

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[1] The parties to the proceeding in the United States Court of Appeals for the Third Circuit were: Martin Danziger, Acting Chairman; Donald Thomas, Commissioner; Madeline McWhinney, Commissioner; Carl Zeitz, Commissioner, constituting the Casino Control Commission, State of New Jersey; G. Michael Brown, Director, Department of Law Public Safety, Division of Gaming Enforcement, State of New Jersey; Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey and Thomas Kean, Governor, State of New Jersey, Appellants herein; and Hotel and Restaurant Employees and Bartenders International Union Local 54 and Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54, Appellees herein. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 331, were intervenors in the proceeding before the United States District Court for the District of New Jersey, but did not participate in the proceeding before the Court of Appeals for the Third Circuit.

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*Appellants,*

*v.*

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

*Appellees.*

**On Appeal from the United States Court of Appeals for the Third Circuit**

## BRIEF FOR APPELLANTS

## Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 709 F. 2d 815 (3d Cir. 1983 (J.S. App. 1a-77a).[2] The opinion of the United States District Court for the District of New Jersey is reported at 536 F. Supp. 317 (D.N.J. 1982) (J.S. App. 78a-128a).

The unreported opinions of the New Jersey Casino Control Commission have been reprinted (J.S. App. 131a-205a, and at 208a-216a).

## Jurisdiction

This is an action for declaratory, injunctive, and monetray relief, brought under 28 U.S.C. §1331, 1337 and 1343 (1976 & Supp. V 1981), in which the District Court refused to preliminarily enjoin the enforcement of a portion of New Jersey's Casino Control Act, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984) (J.S. App. 78a-122a).

On June 6, 1983 the United States Court of Appeals for Third Circuit reversed, holding that this statute was preempted by federal labor law, and was therefore invalid under the Supremacy Clause of the Constitution (J.S. App. 1a-37a; J.S. App. 217a-219a). A timely petition for rehearing or rehearing en banc was denied on June 30, 1983 (J.S. App. 220a-222a). A notice of appeal to this Court was duly filed in the Court of Appeals on July 20, 1983 (J.S. App. 224a-229a).

This appeal was docketed in this Court on September 23, 1983, within 90 days from the denial of rehearing below. The jurisdiction of this Court to review the decision of the Court of Appeals on appeal is conferred by 28 U.S.C. §1254(2) (1976). The following cases sustain the Court's jurisdiction to review the judgment on appeal in this case: *Belknap, Inc.* v. *Hale,* 103 S.Ct. 3172, 3176 n. 5 (1983); *City of New Orleans* v. *Dukes,* 427 U.S. 297, 301-303 (1976); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 476-487 (1975); *Construction Laborers* v. *Curry,* 371 U.S. 542, 548-552 (1963).

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[2] Throughout this brief, references to the Joint Appendix to the Jurisdictional Statements will be given in the form "J.S. App. 1a" etc. References to the Appendix filed herewith will be distinguished by using the form "A.1" etc.

## Constitutional and Statutory Provisions Involved

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The National Labor Relations Act, §7, 29 U.S.C. §157 (1976), provides in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

This section is reprinted in full in the appendix to the Jurisdictional Statement at 235a.

The Labor-Management Reporting and Disclosure Act of 1959, §504, 29 U.S.C. §504 (1976), provides in relevant part:

> No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—
>
> (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . .
>
> during or for five years after the termination of his membership in the Communist Party, or for

> five years after such conviction or after the end of such imprisonment . . .

This section is reprinted in full in the appendix to the Jurisdictional Statement at 236a-237a.

The Employee Retirement Income Security Act of 1974, §411, 29 U.S.C. §1111 (1976), provides in relevant part:

> No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, exortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnapping, perjury, assault with intent to kill, any crime described in section 80a-9(a)(1) of title 15, a violation of any provision of this chapter, a violation of section 186 of this title, a violation of chapter 63 of title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—
>
> (1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or
>
> (2) as a consultant to any employee benefit plan,
>
> during or for five years after such conviction or after the end of such imprisonment, whichever is the later . . .

This section is reprinted in full in the appendix to the Jurisdictional Statement at 238a-240a.

The Employee Retirement Income Security Act of 1974, §514, 29 U.S.C. §1144 (1976), *as amended by* Act of Jan. 14, 1983, Pub. L. No. 97-473, §§301(a), 302(b), 96 Stat. 2611, 2613 (1983), provides in relevant part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any

> and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

This section is reprinted in full in the appendix to the Jurisdictional Statement at 241a-245a.

Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984), provides in relevant part:

> a. Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually . . .
>
> b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require. . . .

This section is reprinted in full in the appendix to the Jurisdictional Statement at 246a-247a.

Section 86 of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-86 (West Supp. 1983-1984) is reprinted in full in the appendix to the Jurisdictional Statement at 248a-255a.

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HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

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**On Appeal from the United States Court of Appeals for the Third Circuit**

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## BRIEF FOR APPELLANTS

## Statement of the Case

By referendum held in 1976, the electorate of New Jersey amended their constitution to permit the legislative authorization of casino gambling, geographically limited to Atlantic City, in an effort to revitalize that decaying resort area as well as to increase revenues devoted exclusively to the State's elderly and handicapped residents. N.J. Const. (1947) art. 4, §7, ¶2(D) (West Supp. 1983-1984); *Knight* v. *City of Margate*, 86 N.J. 374, 380, 431 A. 2d 833, 836 (1981).

Charged with the responsibility for implementing the constitutional mandate, the New Jersey Legislature had before it many studies regarding the possibilities for crime and corruption associated with the institution of this industry. *E.g. Second Interim Report of Governor's Staff Policy Group on Casino Gambling* (Feb. 17, 1977); *Report and Recommendations on Casino Gambling by the New Jersey State Commission of Investigation* (April 1977). Responding to these dangers, and to foster public confidence and trust in its system of controls, the Legislature enacted the New Jersey Casino Control Act, a comprehensive licensing scheme "designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries." N.J. Stat. Ann. §5:12-1(b)(6) (West Supp. 1983-1984). *See Knight* v. *City of Margate, supra,* 86 N.J. at 380-383, 431 A. 2d at 837.

To enforce this scheme, the Legislature created two separate and distinct State agencies: the Division of Gaming Enforcement ("Division"), a branch of the New Jersey Attorney General's Office, and the New Jersey Casino Control Commission ("Commission"), an independent *quasi*-judicial administrative body. Together, these agencies have the power and duty to investigate, license, supervise and pervasively control legalized gambling in all its aspects. N.J. Stat. Ann. §§50, 76, 80-95 (West Supp. 1983-1984).

In order to further assure that the goals of the Act would be realized, the Legislature imposed on those business entities seeking to own and operate casino hotels strict licensure requirements, and mandated that such businesses establish by clear and convincing evidence their financial responsibility, and their good reputation for honesty and integrity, N.J. Stat. Ann. §5:12-84(a)-(c) (West Supp. 1983-1984). Furthermore, each officer, each director and each person having the ability either to control a corporate casino company or elect a majority of its board of directors also is required to demonstrate by clear and convincing evidence his financial responsibility, business ability, and good character, honesty and integrity, N.J. Stat. Ann. §5:12-85(c) (West Supp. 1983-1984). Finally, with respect to the casino operator, the *bona fides* of its parent and each of its financial backers must also be demonstrated, N.J. Stat. Ann. §5:12-84(b), 85(d)-(e) (West Supp. 1983-1984).

The licensure scheme also extends beyond the casino company itself to persons involved in the operation of the casino, N.J. Stat. Ann. §5:12-9, 89 (West Supp. 1983-1984) as well as persons employed by the casino hotel who have access to the casino floor, N.J. Stat. Ann. §5:12-7, 90 (West Supp. 1983-1984); a registration process pertains to casino hotel employees whose functions do not require access to the casino itself, N.J. Stat. Ann. §5:12-8 and 91 (West Supp. 1983-1984). In addition, the Legislature prescribed licensure for all persons and entities supplying the casino hotels with goods or services on a regular and continuing basis, N.J. Stat. Ann. §5:12-12, 92 (West Supp. 1983-1984), and required that the Commission scrutinize each and every contract into which a casino hotel enters to assure the suitability of the other parties involved. N.J. Stat. Ann. §5:12-104(b) (West Supp. 1983-1984). The point of all of these stringent standards and regulations is to enable the Commission to fulfill its most important and essential mission, *i.e.* to assure that licenses, certificates and permits not issue to, nor be held, directly or indirectly, by unqualified or unsuitable persons, N.J. Stat. Ann. §5:12-64 (West Supp. 1983-1984).

As part of this larger and overall scheme of regulating the gaming industry, the Legislature also established a registration system for those labor organizations representing, or seeking to represent, state-licensed or state-registered casino hotel employees. N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984) (J.S. App. 246a-247a). This system relies for its enforcement on five distinct steps. First, each labor organization and its officials must register, *i.e.* file certain specified information, annually with the Commission. Second, the Division investigates the officials of a registered labor organization, in order to determine whether any such official is disqualified in accordance with the standards set forth in Section 86 of the Act, N.J. Stat. Ann. §5:12-86 (West Supp. 1983-1984) (J.S. App. 248a-255a), and reports that fact to the Commission. Third, in the event of an unfavorable report from the Division, the Commission must hold an adversarial administrative hearing, according the affected labor organization and officials full rights to participate as parties therein. See N.J. Stat. Ann. §5:12-94, 107 (West Supp. 1983-1984). Fourth, based on the record adduced at the hearing, the Commission must determine whether any official of the labor organization is indeed disqualified and, if so, whether the disqualification should nevertheless be waived consistent with public policy and the interests of justice. Finally, in the event an official is disqualified, the disqualification is not waived, and the official remains in office, the Commission has the authority to preclude the affected labor organization from receiving dues from any employees of a casino hotel or from administering any pension or welfare funds on their behalf.

As noted, the qualifications of labor officials are measured solely by the criteria enumerated in Section 86 of the Act, N.J. Stat. Ann. §5:12-86 (West Supp. 1983-1984) (J.S. App. 248a-255a), which enunciate certain statutorily-proscribed conduct. Encompassed within these criteria are disqualification for conviction of any of a series of enumerated crimes, N.J. Stat. Ann. §5:12-86(c) (West Supp. 1983-1984) (J.S. App. 248a-253a), and one's membership in, or operation as a strawman for, organized

crime, N.J. Stat. Ann. §5:12-86(f) (J.S. App. 254a).[3] All of the other licensure, registration, and qualification schemes referred to above also incorporate these very same disqualifying criteria, and in most instances, but exclusive of casino labor organizations,[4] encompass as well the affirmative burden of proving the positive suitability criteria of good character, honesty and integrity. See *e.g.*, N.J. Stat. Ann. 5:12-92(b), -90(b), -89(b), and -85(c) (West Supp. 1983-1984).

In accordance with and pursuant to Section 93, Appellee Hotel and Restaurant Employees and Bartenders International Union Local 54 ("Local 54"), a labor union representing approximately 8,000 casino hotel employees,[5] registered with the Commission as did its president, Appellee Frank Gerace, and other officers, agents and prin-

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[3] The provisions of Section 86 noted in the text were the ones which occasioned the disqualification of union officials in this case. Other disqualification criteria, not applied herein, include an individual's failure to provide information required by the Act or the supplying of false information thereunder, N.J. Stat. Ann. §5:12-86(b) (J.S. App. 248a); current prosecution for any crime for which conviction would constitute a disqualification, N.J. Stat. Ann. §5:12-86(d) (J.S. App. 253a); pursuit of economic gain in an occupational manner in violation of criminal or civil public policy, N.J. Stat. Ann. §5:12-86(e) (J.S. App. 254a); commission of acts constituting disqualifying crimes whether or not such acts had been, or could be, prosecuted criminally, N.J. Stat. Ann. §5:12-86(g); and contumacious defiance of any legislative or other official state or federal body engaged in the investigation of crimes relating to gaming, official corruption, or organized crime activity, N.J. Stat. Ann. §5:12-86(h) (J.S. App. 255a).

[4] N.J. Stat. Ann. §5:12-86(a) (J.S. App. 248a), which generally disqualifies an applicant for failure to affirmatively prove by clear and convincing evidence his good character, honesty and integrity is of no real effect with regard to union officials because such officials have no affirmative obligation imposed by the Act to demonstrate "good character". Rather, as the Commission held in the present case, the burden of demonstrating a Section 86 disqualification of a labor leader falls squarely upon the Division (J.S. App. 136a).

[5] These 8,000 casino hotel employees represent fully three-fourths of the union's total membership (J.S. App. 4a).

cipal employees. Thereafter, and as the result of its independent investigation, the Division, on May 11, 1981, filed a report with the Commission indicating possible grounds for disqualification of various union officers and agents, including Gerace, based upon their criminal convictions and/or organized crime associations. A hearing before the Commission to consider the Division's allegations was scheduled to commence in September 1981 (J.S. App. 4a-7a).

On August 17, 1981, Local 54 and Gerace as plaintiffs filed in the United States District Court for the District of New Jersey a complaint for declaratory, injunctive, and monetary relief, together with a motion for a preliminary injunction (A. 4-20, 49-54). The plaintiffs urged that N.J. Stat. Ann. §5:12-93 was preempted by federal labor law, and that they would be irreparably harmed if the Commission hearing were permitted to proceed as then scheduled (A. 49-54). Faced with the possible issuance of a temporary restraining order, the Commission agreed to defer its administrative hearing pending the District Court's ruling (J.S. App. 8a).

On March 22, 1982, the District Court issued a ruling denying the plaintiffs' motion for a preliminary injunction. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger,* 536 F. Supp. 317 (D.N.J. 1982) (J.S. App. 78a-122a). While appeals of this ruling were pending in the United States Court of Appeals for the Third Circuit, and because no preliminary injunction or injunction pending appeal had been granted, the Commission convened a hearing. Prior to the commencement of that hearing, the Division filed a supplemental report with the Commission alleging that two additional union officials were disqualified by virtue of their criminal records (J.S. App. 135a-136a). The Commission hearing, which began on June 8, 1982, and in which Local 54 and Gerace fully participated, focused on the matters raised in the two Division reports and concluded on September 13, 1982.

After reviewing the testimony of the witnesses and the documents entered into evidence, the Commission issued a

final decision, dated September 28, 1982, declaring that certain union officers and agents were disqualified (J.S. App. 131a-197a). Appellee Gerace and one other official were disqualified because they were associates of organized crime members and conducted their union affairs under the influence of those organized crime members (J.S. App. 175a-176a). A union agent was also disqualified because of his conviction for extorting money, while an Atlantic City public official (J.S. App. 193a-196a).

As a result of its findings of disqualification as to the three officials, the Commission issued an order pursuant to N.J. Stat. Ann. §5:12-93 providing in substance that if any of the disqualified individuals remained as an officer, agent or principal employee of Local 54 as of October 12, 1982, the union would thereafter be prohibited from collecting dues from any employee licensed or registered under the Casino Control Act and employed by a casino licensee or its agent (J.S. App. 206a-207a). Additionally, on October 12, 1982, the Commission issued a supplemental opinion which concluded that the additional sanction available to it under N.J. Stat. Ann. §5:12-93, *i.e.* the prohibition on the administration of pension or welfare funds, would not be applied to Local 54 based on the record presented in this case (J.S. App. 208a-215a). Enforcement of the order banning dues collection was enjoined by the District Court, awaiting resolution of the pending appeals (J.S. App. 129a-130a).

All parties subsequently filed with the Court of Appeals a joint motion to supplement the record on appeal with the decisions and order of the Commission, which motion was granted. On June 6, 1983, the Court issued its 2-1 decision in this matter. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danziger*, 709 F.2d 815 (3d Cir. 1983) (J.S. App. 1a-77a).

The majority held in essence that the disqualification standards for union representatives and the dues collection ban established by N.J. Stat. Ann. §5:12-93 were both preempted by Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §157 (1976), and that

the prohibition on the administration of pension or welfare funds was preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), §514, 29 U.S.C. §1144 (1976). The order appealed from was therefore reversed, and the case remanded for the entry of an order enjoining the Commission and Division from taking any further action to enforce any part of N.J. Stat. Ann. §5:12-93 (J.S. App. 16a-37a). In an opinion dissenting in part, Judge Becker agreed with the majority that ERISA precluded the Commission from regulating the management of welfare and pension funds. He disagreed, however, that the remainder of N.J. Stat. Ann. §5:12-93 was precluded (J.S. App. 38a, 72a-77a).

A timely petition for rehearing or rehearing en banc was filed with the Court of Appeals, which denied the petition by an evenly-divided vote of 5-5 (J.S. App. 220a-222a). The instant appeal to this Court was docketed within 90 days thereafter, and probable jurisdiction was noted on November 28, 1983 (A. 57). The case was consolidated with the appeal by the Casino Control Commission in *Danziger, etc., et al.* v. *Hotel and Resaurant Employees and Bartenders International Union Local 54, et al.*, No. 83-573 (A. 57-58).

## Summary of Argument

In situations where a state enactment is challenged under the Supremacy Clause as being preempted by federal law or policy, the Court has adopted and employed a flexible approach which seeks, whenever possible, to reconcile the operation of both regulatory systems with one another. *See, e.g., Pacific Gas & Elec. Co.* v. *State Energy Comm'n*, 103 S.Ct. 1713 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117 (1973). This approach is no less reflected in the Court's decisions in the labor law field.

The rule there applied is that if the conduct a State seeks to regulate is protected or prohibited by federal labor law, otherwise applicable state law and procedures are ordinarily preempted. *San Diego Bldg. Trades*

*Council* v. *Garmon*, 359 U.S. 236, 245 (1959). Nevertheless, state regulation may still be sustained, absent compelling congressional direction, where the behavior to be regulated touches interests deeply rooted in local feeling and responsibility. *Belknap, Inc.* v. *Hale*, 103 S.Ct. 3172, 3177 (1983). Resolution of the question whether state regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the NLRB's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the challenged regulation to the State as a protection to its citizens. *Local 926, Int'l Union of Oper. Eng.* v. *Jones*, 103 S.Ct. 1453, 1459 (1983).

The present case involves the preemptive scope of Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §157 (1976) (J.S. App. 235a), which in part guarantees employees the right to "bargain collectively through representatives of their own choosing". Another provision of national labor law, Section 504(a) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §504(a) (1976) (J.S. App. 236a-237a), establishes federal disqualification standards for officials of labor organizations. The question before this Court is whether New Jersey, as part of its comprehensive regulation of its casino gambling industry, may enforce more stringent standards of conduct than those applicable under federal law for officials of unions representing state-licensed employees engaged in that one localized industry. N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984) (J.S. App. 246a-247a). Resolution of the issue involves the Court in an analysis of the congressional intent reflected in the NLRA and the LMRDA, and in an assessment of its two most significant prior decisions on this subject, *Hill* v. *Florida*, 325 U.S. 538 (1945), and *DeVeau* v. *Braisted*, 363 U.S. 144 (1960).

In *Hill*, the Court had before it a state statute, applicable to all unions operating within the jurisdiction, which mandated the filing of certain information and which pur-

ported to establish broad qualification standards including "good moral character" for officials of such unions. Labor organizations which failed to meet their filing obligations, or which employed unqualified agents, were subject to an injunction prohibiting them from engaging in collective bargaining. Under these circumstances the Court held that the state requirement of filing information did not conflict with federal labor law, but that the disqualification standards for union office imposed by the state enactment, and the sanction imposed for failure to meet those standards, were preempted by Section 7 of the NLRA. 325 U.S. at 539-544.

Three events occurred subsequent to *Hill* which place that decision in proper perspective. First, Congress in 1953 approved a compact between New York and New Jersey, designed to attack the problems of crime and corruption which had theretofore plagued the State's common waterfront, which relied for its enforcement on a statute establishing stringent disqualification standards for officials of waterfront labor unions. Second, reacting to the disclosures of the McClellan Committee regarding racketeering, crime and corruption in the labor movement, Congress itself established criteria disqualifying certain persons from holding union office as part of the LMRDA in 1959. Finally, this Court's own approach to preemption evolved from one weighted heavily toward federal preclusion to one more amenable to the concurrent exercise of state regulatory authority. It was against this background that the Court revisited the Section 7 preemption issue in *DeVeau* v. *Braisted, supra.*

In *DeVeau,* the Court considered the validity of Section 8 of the Waterfront Commission Act, which was enacted in furtherance of the bi-state compact referred to above. The statute barred any convicted felon from serving as an official of a waterfront labor union, and enforced its ban by precluding a union employing such a disqualified official from collecting dues from waterfront empolyees. The claim advanced before this Court was that, to the extent Section 8 restricted waterfront employees' choice of

bargaining representatives, it was preempted by the NLRA. 363 U.S. at 144-145, 151-152.

In an opinion for a four-Justice plurality, Justice Frankfurter first rejected the notion that Section 7 of the NLRA excluded every state policy restricting the complete freedom of a group of employees to designate representatives, finding instead that the preemption question was not "a problem in physics but one of adjustment," and that the operation of Section 8—in light of its background and purpose, *i.e.* combatting local crime infesting a particular industry—did not frustrate national labor policy. 363 U.S. at 151-155. Justice Frankfurter also found that Section 504(a) of the LMRDA, which established federal disqualification standards for holding union office, did not preclude the imposition of more stringent standards by the States, such supplementary state legislation being affirmatively permitted by Sections 603(a) and 604 of the LMRDA as well. 363 U.S. at 155-157. Accordingly, Section 8 of the Waterfront Commission Act was upheld in its entirety, 363 U.S. at 160, a judgment concurred in by Justice Brennan, 363 U.S. at 160-161.

Based upon the foregoing, the Appellants contend that Section 93 of the New Jersey Casino Control Act should also be upheld in its entirety. The statute's registration provisions, which initiate the State's investigatory and regulatory process, are similar to the information filing requirements permitted in *Hill* v. *Florida, supra,* 325 U.S. at 543, which should be dispositive herein. As for the standards of conduct applied by Section 93 to officials of casino unions, these standards are narrowly focused upon criminal or *quasi*-criminal activity, and are designed to further the State's deeply-rooted and compelling interest in preventing corruption in its casino gaming industry. Applying the balancing test established by this Court, the restrictions imposed by Section 93 upon casino hotel employees' right to select union leaders—which only go minimally beyond those restrictions on choice already imposed by Congress itself in Section 504(a) of the LMRDA—are more than amply justified by the importance of the regu-

lation, confined as it is to this unique and localized industry, as a protection to the State's citizens. The state regulations in issue will not interfere with the jurisdiction of the NLRB, because the aims and functions of the state and federal agencies involved do not overlap and are totally compatible. See *El Dorado, Inc.*, 151 NLRB 579 (1965).

With respect to the sanctions available under Section 93(b) to secure the removal of disqualified casino union officials, these too are valid under federal labor law. The prohibition on the receipt of dues is the same penalty upheld in *DeVeau* v. *Braisted, supra*, 363 U.S. at 145, and does not impermissibly interfere with the performance of the union's functions under the NLRA, *Alabama Federation of Labor* v. *McAdory*, 325 U.S. 450, 466 (1945). As for the ban on administering pension or welfare funds, the question is a closer one because Section 514 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1144 (1976) (J.S. App. 241a) expressly preempts state laws insofar as they "relate to any employee benefit plan." However, Section 411 of ERISA, in a fashion similar to Section 504(a) of the LMRDA, 29 U.S.C. §1111 (1976) (J.S. App. 238a-240a), also contains standards for the disqualification of fund administrators. It is the position of the Appellants that, in enacting what are in effect more stringent disqualification standards for union officials whose unions also administer employee benefit programs than Congress has imposed directly upon fund administrators, New Jersey is not regulating the funds themselves so as to fall within the preemptive contemplation of ERISA, but is rather permissibly supplementing the federal criteria using the same reasoning employed in *DeVeau*. See *Int'l Longshoremen's Assn.* v. *Waterfront Comm'n*, 495 F. Supp. 1101, 1124-1125 (S.D. N.Y. 1980), *aff'd in part and rev'd in part on other gds.*, 642 F. 2d 666 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981); *Local 1804* v. *Waterfront Comm'n*, 85 N.J. 606, 615-617, 428 A. 2d 1283, 1288-1289 (1981).

## ARGUMENT

**Section 93 of the New Jersey Casino Control Act is not preempted by federal labor law or policy.**

Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984), is a narrowly-drawn statute designed to meet a compelling local interest: the prevention of corruption and organized crime involvement in the State's casino gaming industry through the back door of labor organizations closely associated therewith. This provision was enacted as part of a larger and comprehensive statutory scheme whose sole purpose is to regulate casino gambling in Atlantic City in all its aspects, and decidedly not to intrude in any way upon the delicate bargaining relationship between employees and employers in that industry.

That New Jersey has no interest in regulating labor-management relations within its casino industry, or in the negotiations or terms of the agreements entered into between the parties, is abundantly manifest. Most notably, Section 93 of the Casino Control Act does not prohibit at any point any labor organization from acting as the employees' collective bargaining representative or from performing any collective bargaining functions. Rather, and only as a consequence of having engaged in certain statutorily proscribed conduct, the leadership of such organizations would be required to forfeit their offices or having failed or refused to do so, their union may be barred from receiving dues or administering employee benefit plans. The enforcement provisions of Section 93 serve only to disqualify *individuals* found to have engaged in specifically delineated conduct prohibited by state law; they do not disqualify a labor union *as an organization,* nor could they, admittedly, exclude any union from acting as the collective bargaining agent of casino hotel employees. The removal of disqualified individuals from association with the casino industry is, in substance, the real aim of the Casino Control Act. See N.J. Stat. Ann. §5:12-1(b)(6), 64 (West Supp. 1983-1984).

Viewed in this manner, the issue before this Court resolves itself into one of whether the State of New Jersey, in the context of regulating its casino gaming industry, is preempted from establishing standards of conduct for officials of unions involved in that industry which are more stringent than those standards generally applicable under federal labor law, and from imposing sanctions designed to encourage the removal from union office of those individuals who fail to meet such standards of conduct, though still leaving the ultimate choice regarding compliance in the hands of the union's membership.[6] In succeeding sections of this brief, we shall show that the State is not preempted and that, consistent with the intent of Congress, the concurrent exercises of federal-state authority at issue here are complementary rather than contradictory, and may lawfully coexist without damage to any national policy.

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[6] In the consolidated appeal in this matter, *Danziger, et al.* v. *Hotel and Restaurant Employees, etc. et al.*, No. 83-573, appellant Casino Control Commission also argues that the lower federal courts should have abstained from reaching the merits of the instant controversy in favor of the New Jersey state system. Consistent with the principle of comity underlying *Younger* v. *Harris*, 401 U.S. 37 (1971), appellants herein raised this argument below but do not press it before this Court (a) because of the overwhelming importance of final resolution by this Court of the merits of the preemption issue to New Jersey's ongoing regulation of casino activity; and (b) because we recognize that even had the lower federal courts exercised their discretion to abstain in favor of a preliminary determination of the substantive issue by the state courts, this Court would nonetheless remain the final arbiter. Should the Court, however, determine to address the abstention issue, we urge that the position of appellant Casino Control Commission be adopted but not, of course, at the expense of leaving the question of preemption raised in this case unresolved. Similarly, in the event a decision by this Court on the preemption issue occasions further proceedings below, we submit, for the reasons advanced by our co-appellant, that such proceedings should properly be brought in state rather than federal court.

**A. Absent compelling congressional direction, federal labor policy permits the operation of state law touching on interests deeply rooted in local feeling and responsibility.**

The doctrine of federal preemption is grounded in the Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, and provides that when Congress legislates pursuant to its delegated powers, conflicting state law and policy must yield. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 210-211 (1824). In applying the Supremacy Clause to subjects which have been regulated by Congress, the primary task of the Court is to ascertain whether a challenged state law is compatible with the policy expressed in the federal statute. In pursuing this task, the Court has developed various well-settled principles for its guidance.

As an initial matter, when a State's exercise of its police power is challenged under the Supremacy Clause, the Court starts with the assumption that the historic police powers of the State were not to be superseded by a federal statute unless that was the clear and manifest purpose of Congress. *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 157 (1978). This assumption provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the Court. *Jones* v. *Rath Packing Co.,* 430 U.S. 519, 525 (1977).

Of course, within constitutional limits Congress may preempt State authority by so providing in express terms. *Aloha Airlines, Inc.* v. *Director of Taxation,* 104 S.Ct. 291, 294 & n. 5 (1983). Even absent explicit preemptive language, congressional intent to prohibit state law altogether may be discerned where a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, where the act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or where the object sought to be obtained by the federal law and the character of obligations imposed by it reveal the same purpose. *Pacific Gas & Elec.*

*Co.* v. *State Energy Comm'n,* 103 S.Ct. 1713, 1722 (1983); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Where Congress has neither explicitly nor implicitly displaced state regulation in a specific area, state law will only be nullified to the extent that it actually conflicts with a federal statute. *Fidelity Federal Sav. & Loan Ass'n* v. *de la Cuesta,* 102 S.Ct. 3014, 3022 (1982). Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142-143 (1963), or where State law "stands as an obstacle to the execution of the full purposes and objectives of Congress", *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941). Within this analytical framework, the Court has adopted an approach to preemption which has been flexible in attempting to accommodate and reconcile dual federal and state regulatory schemes. *See, e.g. Exxon Corp.* v. *Eagerton,* 103 S.Ct. 2296 (1983); *Pacific Gas & Elec. Co.* v. *State Energy Comm'n, supra; Kewanee Oil Co.* v. *Bicron Corp.,* 416 U.S. 470 (1974); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117 (1973); *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960).

The doctrine of preemption in federal labor law has drawn on the foregoing general precepts, shaped primarily by two competing interests. On the one hand, this Court has recognized that the broad powers conferred by Congress upon the NLRB to interpret and enforce federal labor legislation implies that conflicting rules of law, remedy, or administration cannot be permitted to operate. *Farmer* v. *Carpenters,* 430 U.S. 290, 295 (1977). On the other hand, because Congress has refrained from providing specific direction with respect to the scope of displaced state law, the Court has been unwilling to "declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions." *Amalgamated Ass'n of Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 289 (1971).

Experience with several approaches to the preemption problem in the labor law area eventually led the Court

to adopt the general rule set forth in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959), that "[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield."

At the same time, an exception from preemption was recognized "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act." 359 U.S. at 243-244. This exception was said to be based on "due regard to the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy." 359 U.S. at 243.

Consistent with such considerations of federalism, the "deeply rooted state interest" exception has been relied upon by the Court to sustain a variety of state activities which otherwise might arguably have been precluded by operation of national law. *See, e.g., Belknap, Inc.* v. *Hale*, 103 S.Ct. 3172 (1983) (contract actions by striker replacements); *New York Tel. Co.* v. *New York State Dep't of Labor*, 440 U.S. 519 (1979) (payment of unemployment benefits to strikers); *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978) (state trespass law); *Farmer* v. *Carpenters, supra*, (tort remedy for infliction of emotional distress); *Vaca* v. *Sipes*, 386 U.S. 171 (1967) (action for breach of union's duty of fair representation); *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966) (action for malicious libel); *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958) (tort action for wrongful interference with occupation by blocking access to employment); *United Construction Workers* v. *Laburnum Const. Corp.*, 347 U.S. 656 (1954) (tort action founded on threats of violence). In these circumstances, the State's interest in controlling

or remedying the effects of certain conduct has been balanced against both the interference with the NLRB's ability to adjudicate controversies committed to it by federal law and the risk that the State will sanction conduct that federal law protects. *Belknap, Inc.* v. *Hale, supra,* 103 S.Ct. at 3177; *Sears, Roebuck & Co.* v. *Carpenters, supra,* 436 U.S. at 197-200; *Farmer* v. *Carpenters, supra,* 430 U.S. at 297. Put another way, as the Court recently observed in *Local 926, Int'l Union of Oper. Eng.* v. *Jones,* 103 S.Ct. 1453, 1459 (1983):

> The question of whether regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.

In the present case, the Court of Appeals majority declined to engage in any weighing and balancing of federal and state interest, following instead what it believed to be a rule of absolute preemption where activity protected under Section 7 of the NLRA is involved. 709 F. 2d at 828 (J.S. App. 27a-28a). Although this Court has observed that the considerations underlying the arguably protected or the arguably prohibited branches of the *Garmon* doctrine may differ in some respects, *Sears, Roebuck & Co.* v. *Carpenters, supra,* 436 U.S. at 190, the Court has also emphasized its refusal to apply the *Garmon* guidelines in a "literal, mechanical fashion," stating: "[T]he history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." 436 U.S. at 188. It is submitted by the Appellants that the absolute preemption doctrine applied by a majority of the Court of Appeals below is not in accord with prevailing law and that assessment of the competing interests here involved compels the conclusion that the state regulation in issue is not preempted by federal labor policy.

**B. Congress did not intend to preempt the states from imposing in some situations restrictions on who may serve as a union official.**

As a premise for its decision in this case striking down Section 93 of the Casino Control Act, the Court of Appeals majority expressed its belief that an employee's choice of bargaining representative was absolutely and totally protected by Section 7 of the NLRA from any state infringement. 709 F. 2d at 828-829 (J.S. App. 27a-28a). Appellants submit that the Court of Appeals' view fundamentally misperceives the intent of Congress as interpreted by this Court, for the reasons outlined below.

***1. Section 7 of the National Labor Relations Act, which grants employees the right to bargain colectively through representatives of their own choosing, permits some state-imposed restrictions under certain circumstances.***

Section 7 of the NLRA, 29 U.S.C. §157 (1976) (J.S. App. 235a), provides in relevant part that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . ." This portion of Section 7 was enacted as part of the original NLRA in 1935,[7] see 49 Stat. 452, and its preemptive scope was initially addressed by this Court in *Hill* v. *Florida,* 325 U.S. 538 (1945).

That case arose from legislation of the State of Florida which undertook to regulate labor unions and their officers, and which prohibited any person from acting as a "business agent" for any "labor organization" without having obtained a State-issued license. To secure such a license, a person had to pay a $1.00 fee and file an application with the Secretary of State. To permit the filing of objections to licensure, the application was held for 30 days; thereafter, the application was submitted to a board consisting of several state officials for a decision. Section 4 of

[7] The section was reenacted as part of the Labor Management Relations Act of 1947, Pub. L. No. 101, ch. 120, §7, 61 Stat. 140 (1947).

the Act provided that no person could be licensed as a business agent of a labor union who had not been a citizen of the United States for more than 10 years, who had been convicted of a felony, or who was not a person of good moral character. As to unions themselves, Section 6 of the Act required every labor organization operating in the State to file an annual report with the Secretary of State disclosing its name, the location of its offices, and the names and addresses of its officers, along with a filing fee of $1.00. A separate provision rendered violation of the Act by any person or labor organization a misdemeanor. 325 U.S. at 540, 556-557.

Pursuant to state law, the Attorney General of Florida sought an injunction in state court against a union and its business agent, Hill, seeking to restrain them from functioning as such until they had complied with the requirements of Section 4 and 6 of the Act. The injunction was granted, over a claim that Sections 4 and 6 were preempted by the NLRA (or "Wagner Act"), and it was this preemption question which was ultimately presented to the Court for review. 325 U.S. at 539-541, 557.

In an opinion for the majority, Justice Black first addressed the relationship between Section 4 of the Florida statute and the rights secured to employees by the NLRA. In his view:

> It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. . . .
>
> Section 4 of the Florida Act circumscribes the "full freedom" of choice which Congress said employees should possess. It does this by requiring a "business agent" to prove to the satisfaction of a Florida Board that he measures up to standards set up by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that §4 limits a union's choice of such

> an "agent" or bargaining representative, it substitutes Florida's judgment for the workers' judgment. . . . No elaboration seems required to demonstrate that §4 as applied here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [325 U.S. at 541-542].

As an additional consideration, it was noted that operation of the Florida law had already interfered with the collective bargaining process by inspiring an employer to refuse to bargain with a duly selected representative of workers on the ground that the representative had not secured a Florida license as a business agent. Although the NLRB subsequently ruled that the employer was required to bargain with a properly selected union agent without regard to the agent's compliance with state licensing provisions, the majority held that the union agent's own exposure to punishment for functioning in a collective bargaining role in effect curtailed his freedom to bargain, and that, in and of itself, constituted a frustration of Congressional intent. 325 U.S. at 542.

Finally, with regard to the reporting requirements placed on the labor organization by Section 6 of the Florida Act, the majority drew a distinction between the reporting requirements themselves and the penalties applicable for their violation. As to the former, the Court found that "[t]he requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act." 325 U.S. at 543. Noting, however, that, for its failure to comply the union had been directly enjoined from functioning as a labor union, the Court held the injunction to constitute an impermissible obstacle to collective bargaining. 325 U.S. at 543. In essence, it was "the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining." 325 U.S. at 543. For all of these reasons, the state enactments, as enforced, were held to be preempted by the NLRA. 325 U.S. at 543.

Fifteen years after the decision in *Hill*, the preemptive reach of Section 7 of the NLRA was again considered by the Court in *DeVeau* v. *Braisted*, 363 U.S. 144 (1960). That case involved a challenge to Section 8 of the New York Waterfront Commission Act, which prohibited any person from collecting dues on behalf of any labor organization representing waterfront employees if any officer or agent of that organization had been convicted of a felony and had not subsequently been pardoned or received a certificate of good conduct from the board of parole. 363 U.S. at 145. This statute had been enacted in furtherance of a constitutional compact between New York and New Jersey, designed to combat crime and corruption on the States' mutual waterfront, to which Congress had granted its consent in 1953. 363 U.S. at 147-151.

Before this Court, the appellant, who had been convicted of a felony, argued that New York's threatened enforcement of Section 8 was preempted by Sections 1 and 7 of the NLRA. 363 U.S. at 145-146, 151. The theory advanced was that, under the Waterfront Commission Act, "waterfront employees do not have complete freedom of choice in the selection of their representatives, for if they choose a convicted felon the union is disabled from collecting dues." 363 U.S. at 152. This was said to create a conflict with federal law as construed in *Hill*, thus rendering the New York statute invalid. 363 U.S. at 152.

In an opinion for a four-Justice plurality, Justice Frankfurter rejected any absolutist approach to the NLRA and, in the process, reformulated the preemption test to be applied in such circumstances. In his view:

> It would misconceive the constitutional doctrine of pre-emption—of the exclusion because of federal regulation of what otherwise is conceded state power—to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heedless of the light that Congress has shed for our guidance. The relevant question is whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied

> in §8 of the New York Waterfront Commission Act. Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy? [363 U.S. at 153].

Declining to find in Section 7 a congressional purpose to preclude the States from regulating at all—the NLRA "does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing,'" 363 U.S. at 152—the plurality opinion then examined the compatibility of the federal-state effort, concluding:

> This is not a situation where the operation of a state statute so obviously contradicts a federal enactment that it would preclude both from functioning together or, at least, would impede the effectiveness of the federal measure. Section 8 of the Waterfront Commission Act does not operate to deprive waterfront employees of opportunity to choose bargaining representatives. It does disable them from choosing as their representatives ex-felons who have neither been pardoned nor received "good conduct" certificates. The fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers. [363 U.S. at 152].

Applying these principles to the case at hand, Justice Frankfurter reviewed the purpose, scope and background of the New York legislation, as well as Congress' relation to it, finding the combination of factors to reflect a congressional intent to permit the operation of Section 8 of the Waterfront Commission Act. 363 U.S. 153-154. Moreover, Congress' own adoption of restrictions upon employees' freedom to choose bargaining representatives as part of the Labor-Management Reporting and Disclosure Act of 1959, §504(a), 29 U.S.C. §504 (1976), was itself viewed as evidence that Congress did not con-

sider such restrictions incompatible with its labor policies. 363 U.S. at 155-156. As to the Court's decision in *Hill*, Justice Frankfurter found it to be distinguishable in part on the ground that the state legislation there in issue—unlike that presented in *DeVeau*—was not part of a program "to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry." 363 U.S. at 155. In a brief opinion concurring in the result, Justice Brennan expressed his view that, in part, "Congress has demonstrated its intent that §8 of the New York Waterfront Commission Act should stand despite the provisions of the National Labor Relations Act . . ." 363 U.S. at 160.

Based upon the foregoing, the Appellants submit that the congressional intent reflected in Section 7 of the NLRA does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate representatives of their own choosing. This conclusion is reinforced by the existence of Section 504 of the Labor-Management Reporting and Disclosure Act, as we will now demonstrate.

***2. Section 504 of the Labor-Management Reporting and Disclosure Act, which establishes federal disqualification standards for union officials, does not preempt the states from establishing more stringent standards where justified by a compelling local interest.***

The Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §401 et *seq.* (1976), was enacted primarily to correct the abuses which had been the subject of investigation by the Senate Committee on Improper Activities in the Labor Management Field (McClellan Committee), including the problems of racketeering, crime and corruption in the labor-management field. S. Rep. No. 187, 86th Cong., 1st Sess.; H.R. Rep. No. 741, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. Code Cong. & Ad. News 2318, 2424. Title V of the LMRDA imposes restrictions upon union officers, and defines disqualifications for such officers. Specifically, §504(a) of the Act, 29 U.S.C. §504(a), provides in part that

> "[n]o person . . . who has been convicted of, or served any part of a prison term resulting from his conviction of [a series of enumerated crimes] shall serve . . . as an officer . . . of any labor organization . . . for five years after such conviction or after the end of such imprisonment . . ."

The preemptive reach of this section was definitively resolved by the Court in *DeVeau* v. *Braisted, supra.*

That case, to reiterate, involved a challenge to Section 8 of the Waterfront Commission Act, which disqualified ex-felons from holding office in waterfront labor organizations upon conviction for more and different crimes than those listed in Section 504(a) of the LMRDA, and imposed a ban which was not limited to five years as was the case under the federal enactment. In addition to preemption arguments based on the NLRA, the appellant in *DeVeau* also urged that any state disablement from holding union office which had terms at variance with Section 504(a) was impliedly barred by it. 363 U.S. at 156. Justice Frankfurter, however, found just the opposite conclusion to be indicated by the lack of an express provision within Section 504(a) preempting state action, when other sections of the LMRDA contained such provisions where Congress meant to exclude the operation of state law. 363 U.S. at 156. Justice Frankfurter's view was made conclusive by the existence of two other provisions of the LMRDA, Sections 603(a) and 604, which together were held to affirmatively preserve the operation of state laws such as Section 8 of the Waterfront Commission Act. 363 U.S. at 157. In his brief concurrence in *DeVeau,* Justice Brennan agreed that "the Labor-Management Reporting and Disclosure Act of 1959 explicitly provides that it shall not displace such legislation of the States." 363 U.S. at 160-161.

Based upon this analysis, three principles are clear. First, the very existence of Section 504(a) of the LMRDA constitutes persuasive evidence that Congress does not view all restrictions upon employees' freedom to choose bargaining representatives as incompatible with its labor poli-

cies as set forth in Section 7 of the NLRA. Second, the absence of an express preemption provision from Section 504(a) demonstrates that state law of a supplemental nature is not to be automatically precluded thereby. Finally, Sections 603(a) and 604 of the LMRDA affirmatively preserve the operation of certain state disqualification provisions. In articulating these principles, the Appellants do not suggest that a State may validly impose any standards it wishes on holders of union office in any industry desired. Where, however, a compelling and demonstrable need exists to go beyond the federal norm in a unique and localized industry particularly susceptible to corruption, and one heretofore criminally outlawed altogether, Congressional policy will permit the imposition of stricter standards of conduct on labor leaders engaged in such an industry. Appellants submit that New Jersey's casino gambling industry—like the waterfront industry considered in *DeVeau*—presents such an exceptional need, as explained in the sections which follow.

**C. New Jersey's comprehensive regulation of casino gaming is a matter deeply rooted in its local feeling and responsibility and the prevention of corruption within that industry constitutes a compelling interest.**

In our State, so extraordinarily sensitive and parochial a concern to the State and its people is gaming that such a matter is governed directly by the New Jersey Constitution itself. *N.J. Const.* (1947), Art. IV, §VII, par. 2(D) (West Supp. 1983-1984). Public approval of the amendment legalizing casino gaming followed only after assurances were given that our state would have the strongest regulation of casinos in the world; that only those individuals of the highest character, integrity and competence would be permitted to participate in casino operations; and that organized crime would be prevented from infiltrating the casino industry in any fashion 709 F.2d at 846-847 (J.S. App. 66a).

That such assurances were necessary is not surprising. Manifestly a unique industry, casino gambling has had a checkered history, particularly in Nevada, where or-

ganized crime infiltrated and dominated the industry's early development. *The Development of the Law of Gambling; 1776-1976* at 437-467 (U.S. Dept. of Justice, 1977); *Marshall* v. *Sawyer*, 301 F.2d 639, 648-654 (9th Cir. 1962) (Pope, J., concurring); *Nevada Tax Comm'n* v. *Hicks*, 73 Nev. 115, 310 P.2d 852, 854 (1957). This history confirmed the long-held view that revenues derived from gambling are the lifeblood of organized crime. See *United States* v. *Garrison*, 348 F. Supp. 1112 (E.D. La. 1972); *United States* v. *Bally Mfg. Corp.*, 345 F. Supp. 410, 419 (E.D. La. 1972). Indeed, in recent testimony before a Senate Committee, Federal Bureau of Invesigation Director William Webster informed the committee that illegal gambling still represents the greatest single revenue producer for organized crime, but that legal gaming too provides organized crime with the opportunity to "skim" the proceeds because of its nature as a cash-intensive industry. *Organized Crime in America: Hearings before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 66, 69 (1983).

Our Legislature, vitally concerned of a similar involvement here, convened numerous public hearings and interested parties were permitted to comment on the legislation proposed to implement the constitutional provision establishing casino gaming. 709 F.2d at 847 (J.S. App. 67a). Additionally, the Legislature had before it several studies pertinent to casino gaming and describing the possibilities for crime and corruption associated with the institution of legalized gaming. 536 F.Supp. at 322 (J.S. App. 84a). These hearings and studies largely confirmed that which had been generally suspected: the cash nature of the business—that is, the enormous amount of money that flows daily through a casino operation and the large number of unrecorded transactions associated therewith—make the industry an extremely attractive and vulnerable target for organized criminal elements, who may use the proceeds obtained from gambling to finance illegal activities, infiltrate legitimate business, and corrupt and subvert our democratic processes. See *Development, supra*, at 453-459; *United*

*States* v. *Garrison, supra,* at 1119; Organized Crime Control Act of 1970, Statement of Findings and Purpose, reprinted following 18 U.S.C. §1961 (1976); (J.S. App. 64a-66a).

Determined to prevent and eradicate the illicit conduct theretofore an all-too-often component of casino gaming, the Legislature promulgated the Casino Control Act, N.J. Stat. Ann. 5:12-1 et seq. (West Supp. 1983-1984). Reviewing the rationale for, and the goals of, this comprehensive statute, our Supreme Court, in *Knight* v. *City of Margate, supra,* stated:

> At the very heart of the public policy embraced by the new law is "the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations." N.J.S.A. 5:12-1 (b)(6). Related directly to this purpose, the Legislature stated that "the regulatory provisions . . . are designed to extend strict State regulation to all persons . . . practices and associations related to" casinos and that "comprehensive law-enforcement supervision . . . is further designed to contribute to the public confidence and trust in the efficacy and integrity of the regulatory process." *Id.* . . .[B]ecause casino operations "are especially sensitive and in need of public control and supervision," the statute dictates that "the regulatory and investigatory powers and duties shall be exercised to the fullest extent consistent with law to avoid the entry" into casino operations, directly or indirectly, of persons whose economic or occupational pursuits are violative of the "criminal or civil policies of this State." N.J.S.A. 5:12-1(b)(9). These public policy objectives were augmented by later amendments which declared that even though "[c]ontinuity and stability in casino gaming operations" were important, these could not be achieved by allowing persons with "unacceptable backgrounds and records of behavior" to control casinos. N.J.S.A. 5:12-1(b)(15); L. 1978, c. 7, §1. [86 N.J. at 380-82; 431 A.2d at 837].

It is quite evident that our casino legislation compels a strong state regulatory interest in all aspects of casino activities as well as those ancillary enterprises and per-

sons which service the casino hotels. Effective oversight and control requires encompassing in the regulatory system not only the casino operators but also the ancillary service providers and affiliated entities. Thus, it is the declared public policy of New Jersey to extend strict regulation to all persons participating in the casino industry and related activities, N.J. Stat. Ann. §5:12-1(b)(6) (West Supp. 1983-1984), as well as those involved, directly or indirectly, with the licensed casino operation, N.J. Stat. Ann. §5:12-64 (West Supp. 1983-1984).

Within this class are, of course, those labor unions representing State licensed or registered casino hotel workers. By virtue of their position as collective bargaining representatives and all the federal rights which attend that status, such unions are not only "materially involved" with casino hotels in Atlantic City but are poised to exert significant control over their operations. At a minimum, casino hotel unions have the ability to obtain information on every aspect governing the employment, management and discipline of casino hotel employees;[8] to compel negotiations over all forms of remuneration, work standards, causes for discipline and discharge, grievance and binding arbitration procedures, priorities in assignment, layoff and recall of casino hotel workers and various union rights;[9] to take concerted action against the casino hotels to enforce its bargaining demands including calling a strike or setting up picket lines;[10] to compel NLRB intervention;[11] and to administer collective bargaining agreements on behalf of member employees.[12] In sum, unions such as Appellee Local 54 have the right to involve themselves directly into casino hotels in a multi-

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[8] *See, NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967).

[9] 29 U.S.C. §§158(a) and (d) (1976); *see e.g. National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940).

[10] See 29 U.S.C. §163 (1976); *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665 (1951).

[11] 29 U.S.C. §158 (1976).

[12] 29 U.S.C. §159 (1976).

tude of ways and the right to exert significant control over casino hotel employees. By virtue of those rights, the Appellees possess power to affect the operation of the casino hotel itself.

State supervision of labor organizations involved in gaming was also determined by the Legislature to be critical because, as the New Jersey State Commission of Investigation reported in its *Review and Recommendations by the State Commission of Investigation of the Draft Provisions Before the Assembly State Government Casino Gambling Committee* (April 1977), there were

> few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures. Because of the gravity of the public interest in this particular area, the Commission is of the view that the representatives of labor organizations involving casino employees should be required to register and subjected to qualification according to the ownership disqualification criteria. [Id. at 2].[13]

In reaching its conclusion, the Commission of Investigation was not opining on a barren record. Twenty years before, in 1957, the United States Senate Committee on Improper Activities in the Labor-Management Field, com-

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[13] In the same vein, FBI Director Webster recently advised the Senate that organized crime's "interest in labor unions will coincide with their interest in cash-intensive organizations, or with organizations that can influence or intimidate employers that they are trying to take advantage of. Without saying that the particular unions are dominated and controlled by organized crime, we can say that we have identified organized crime contacts and influence in the International Longshoremen's Association, the International Brotherhood of Teamsters, and the Laborers International Union of North America, and the Hotel, Restaurant, and Bartenders Employees' Union." [*Organized Crime in America, supra,* at p. 70].

monly known as the McClellan Committee, discovered numerous abuses in the labor area and revealed a multitude of ways in which corrupt union officials enriched themselves at the expense of the union member. S. Rep. No. *187, supra.* In response, Congress in 1959 enacted the LMRDA. See *Fitzgerald* v. *Catherwood,* 388 F.2d 400, 403 (2d Cir.), *cert. denied,* 391 U.S. 934 (1968). Fifteen years later, Congress passed the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq.* (1976), to give certain protections and guarantees to employees covered by private employee pension and welfare plans. The provisions of this complex piece of legislation improve reporting requirements as well as establish fiduciary standards for the management of these funds. Those two statutes which, *inter alia,* directly target illicit conduct on the part of labor leaders are cut from the same cloth as the 1970-enacted Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 *et seq.* (1976), which outlawed the infiltration and illegal acquisition of legitimate economic enterprises, including labor unions, and the use of both legal and illegal enterprises to further criminal activity.

Given this background, and toward the singular end of bringing within the State's regulatory purview only those labor unions choosing to represent this one sensitive industry's work force, Section 93 of the Casino Control Act was enacted, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984). In a somewhat similar manner to the licensing of those companies supplying the casino hotels on a regular basis with goods and services, the New Jersey Legislature established a registration system[14] for those unions representing casino hotel employees and certified as their sole and exclusive bargaining agent when deal-

[14] A labor union "registrant" is not required to affirmatively demonstrate the suitability of its credentials as is otherwise generally demanded of "licensees". Furthermore, the Appellant Division bears the burden of proving that the registrant is disqualified; a licensee, on the other hand, generally bears the burden of affirmatively proving that it is qualified.

ing with management. This process of registration was designed, not to regulate or oversee the precise bargaining relations and relationships between and among casino hotel employees, their union and their employers, but rather to regulate that conduct on the part of a union's leaders and agents which is contrary to the policies enumerated in the preamble to the Casino Control Act, N.J. Stat. Ann. §5:12-1 (West Supp. 1983-1984). The registration and qualification requirements were intended to close an historically-documented avenue of organized criminal access into casino hotels and to exclude members of organized crime and others whose conduct was unsavory from affecting, through labor unions, the State's casino industry, thereby defusing this potentially explosive combination.

**D. The requirements imposed by Section 93 of the Casino Control Act, and the sanctions permitted for violation thereof, are not incompatible with federal labor policy.**

Having established that Congress did not intend to preempt all state regulations of the type at issue here, embedded as they are in deeply rooted local interests, we now examine the compatibility *vel non* of the dual statutory schemes, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra,* 414 U.S. at 127, and whether Section 93 of New Jersey's Casino Control Act frustrates the achievement of congressional objectives, *Hines* v. *Davidowitz, supra,* 312 U.S. at 67. We reiterate that the *purpose* for which New Jersey enacted Section 93 is not preempted, since this provision is part and parcel of a much broader scheme to govern its casino gaming industry, a matter uniquely and plenarily reposed in the State. As to the actual *operation* of the concurrent exercises of power, perhaps the clearest indication that compliance with both federal and New Jersey law is possible in the present case is the NLRB's express finding that its own assertion of jurisdiction can successfully co-exist with the enforcement of local laws in extensively state-regulated industries, most notably legalized gambling. See *El Dorado, Inc.,* 151 NLRB 579 (1965); *Volusia Jai Alai, Inc.,* 221 NLRB 1280 (1975).

***1. The requirement of registration by a labor organization does not create a conflict with federal law.***

Section 93(a) of the Casino Control Act requires that each labor organization seeking to represent state-licensed employees of a casino hotel must register with the Commission annually, and must disclose the names of its officers and agents, and those of all affiliated organizations, pension and welfare systems. In *Hill* v. *Florida, supra,* this Court considered a challenge to a Florida statute requiring every labor organization operating in the State to file an annual report with the Secretary of State giving the name of the organization, the location of its offices, and the names and addresses of its officers; a filing fee of $1.00 was also required. 325 U.S. at 540, 557. Another section of the statute made it a misdemeanor for any person or labor organization to violate its provisions, and a union failing to report and pay the filing fee was subject to an injunction prohibiting it from functioning and operating until it had complied. 325 U.S. at 540-541, 557.

In this situation, the enforcement of the Florida legislation was held to be preempted by the NLRA. 325 U.S. at 543. Nevertheless, the Court was careful to point out that "the requirement as to the filing of information . . . does not, in and of itself, conflict with the Federal Act," and that "[i]t is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining." 325 U.S. at 543. In effect, a distinction was drawn between the filing requirements themselves, which were not precluded by federal law, and the sanctions applied for a failure to file, which were barred because, as an injunction against the very operation of the labor union, they constituted a "direct impediment to the free exercise of the federally established right to collective bargaining". 325 U.S. at 543.

The Court's decision in *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450 (1945), stands as a

relevant counterpoint to *Hill* in this context. In *McAdory*, the petitioners sought a declaratory judgment that federal labor law preempted an Alabama statute which comprehensively regulated labor unions. Section 7 of the enactment mandated that unions annually file various reports with a state Department of Labor, and further rendered it unlawful for any officer or agent of a union to receive dues from any member while his organization was in default with respect to filing such reports. From an adverse decision, the petitioners sought review in this Court. 325 U.S. at 453-456. In dismissing the previously-granted writ of certiorari, the Court rejected the specific claim that Section 7 of the Act was in conflict with the NLRA:

> [W]e cannot asume that the failure to file reports will result in the exclusion of petitioners, or any of them, from functioning in the state, or visit any consequences upon them other than the penalty for failure to file. We therefore have no question before us of a statute which has been construed to operate either by its penal sanctions or by the aid of injunction to prevent petitioners, or any of them, from functioning within the state for non-compliance with §7. Compare *Hill* v. *Florida* . . . Nor can we say in the absence of any showing to the contrary that the filing of information returns will impose such burdens on any of petitioners as to interfere with the performance of their functions under the National Labor Relations Act in cases where that act is applicable. [325 U.S. at 466].

Reading *Hill* and *McAdory* together, it is clear that a state-imposed requirement that certain information be filed by a labor organization is not, in itself, preempted by the NLRA. *Hill, supra,* 325 U.S. at 543; *McAdory, supra,* 325 U.S. at 466. It is also evident that a sanction for failure to file which directly prohibits a union from engaging in collective bargaining will be precluded by the operation of federal law, *Hill, supra,* 325 U.S. at 543, but that a penalty such as a ban on dues collection will not be so excluded, *McAdory, supra,* 325 U.S. at 466. These twin principles should dictate the result on the facts of the present case.

Here, Local 54 did in fact register with the Commission as required by Section 93(a) of the Casino Control Act (J.S. App. 7a), an obligation which in no manner interfered with the performance of the union's functions under the NLRA, and the union was therefore never threatened with any penalty for noncompliance. Moreover, Section 93 on its face does not make registration a pre-condition to the initiation or continuation of collective bargaining by a labor organization; the statute merely imposes a registration obligation on those unions participating in the casino gaming area. Even assuming the sanctions specified in Section 93(b) of the Act (J.S. App. 247a) are available to enforce the statute's registration requirements, the prohibition on the collection of dues is the same remedy held not to be precluded in *McAdory, supra,* 325 U.S. at 366, and the remaining sanction—the prohibition on the administration of pension or welfare funds—should be sustainable by parity of reasoning as well.[15].

***2. The application to officials of labor organizations participating in the casino gaming industry of disqualification standards more stringent than those generally applicable under federal law is not preempted by any federal statute or policy.***

In the previous section, the Appellants demonstrated that the requirement of registration imposed upon labor organizations by Section 93(a) of the Casino Control Act does not create a conflict with federal law; no balancing of interests was required because the mere filing of information returns does not in itself interfere with a union's functioning under the NLRA. The disqualification standards for union officials embodied in Sec-

[15] Whether other penalties for failure to register exist within the Casino Control Act is an open question under state law, but the speculative possibility that some sanction will in the future be applied to Local 54 in such a manner as to conflict with federal labor law does not present a proper controversy to this Court, *McAdory, supra,* and certainly does not render invalid the existing registration requirements of Section 93(a) of the Act.

tions 86 and 93(b) of the Act stand on a different footing, since these provisions do impose restrictions on who may be chosen for union office beyond those generally applicable under federal law. Under these circumstances, and in light of New Jersey's deeply rooted and compelling interest, the Court must balance the importance of that interest against the degree to which state law substantively conflicts with federal law or interferes with the jurisdiction of the NLRB. *Belknap, Inc.* v. *Hale, supra,* 103 S.Ct. at 3177; *Local 926, Int'l Union of Oper. Eng.* v. *Jones, supra,* 103 S.Ct. at 1459; *Sears, Roebuck & Co.* v. *Carpenters, supra,* 436 U.S. at 190-208.

As regards the conflict between state and federal law, it is true that in *Hill* v. *Florida, supra,* the Court held a State preempted by Section 7 of the NLRA from enforcing a law which purported to establish broad qualification standards for union officials. It is also true, though, that subsequent to *Hill* both Congress and this Court have clearly demonstrated that the freedom of a group of employees to designate "representatives of their own choosing" is necessarily and obviously less than complete.

Congress has acted by acquiescing in the state-imposed restrictions as part of the bi-state compact considered in *DeVeau* v. *Braisted, supra,* and has further acted by adopting for itself criteria disqualifying certain persons from holding union office as part of the LMRDA. It was thus for good reason that Justice Frankfurter could announce in *DeVeau* that "the National Labor Relations Act does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing,'" and that the preemption issue generated by such a state policy was not "a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers." 363 U.S. at 152. At bottom, the question presented by this case is the same question formu-

lated in *DeVeau*: "Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy?" 363 U.S. at 153. The Appellants respectfully submit that Congress would not find in Section 93 of the Casino Control Act a substantial frustration of its labor policy, based upon the following considerations.

First, Section 93 is not the type of broad licensing system condemned in *Hill*, which was applicable to all unions operating within the jurisdiction, which established broad qualification standards including "good moral character" for officials of such unions, and which does not appear to have been adopted in response to any specific danger or for any particular reason other than to exercise some control over collective bargaining functions. See 325 U.S. at 540-542. In sharp contrast, Section 93 of the Act contains narrowly-defined standards of disqualification based exclusively on criminal or *quasi*-criminal conduct rather than "character," and like the legislation upheld in *DeVeau*, is part of a comprehensive program "to vindicate a legitimate and compelling state interest, namely, the interest in combatting local crime infesting a particular industry." 363 U.S. at 155.

In its attempt to distinguish *DeVeau* from this matter, the Court of Appeals majority relied on the fact that the Waterfront Commission Act was adopted pursuant to a *congressionally approved* bi-state compact, thus suggesting that Congress considered its implementation as a singular exception to federal labor policy. 709 F. 2d at 829 (J.S. App. 28a-29a). But this argument proves too much in light of the fact that when Congress ratified the Compact, which by its own terms reaffirmed the employee rights of association, self-organization and designation of representatives of their own

choosing,[16] see 363 U.S. at 163-164, that body was also fully conscious of the state-imposed restrictions on those rights embodied in Section 8 of the New York Act, 363 U.S. at 151. The more sound inference to be drawn from congressional tolerance in *DeVeau*, then, is that Congress viewed the Section 8 limitations as fully compatible with rights guaranteed by Section 7 of the NLRA and its own acquiescence therein as consistent with, rather than a modification of, well-established federal labor policy. Moreover, as pointed out by Judge Becker in his dissenting opinion in the Third Circuit:

> The Waterfront Commission Compact was presented to and considered by Congress not because its authors and sponsors believed it to embody a scheme that contravened the NLRA but because the Compact contemplated the establishment of a bi-state commission to combat evils that could not be eradicated by the two states acting individually. See H.R. Rep. No. 998, 83d Cong., 1 Sess. 3 (1953). In other words, it was the bi-state nature of the compact, and not any potential intrusion on national labor policy, that demanded congressional attention. [709 F. 2d at 845 (J.S. App. 62a-63a)].

The totality of these factors demonstrates conclusively that while the approval of the waterfront compact following congressional hearings facilitated ascertainment of congressional intent in *DeVeau*, Justice Frankfurter's pre-

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[16] Indeed, Art. XV, §1, of the Compact itself stated:

> This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own chooisng. [363 U.S. at 163-164].

Clearly, if Section 7 of the NLRA had been an absolute as contended for by the appellant in *DeVeau*—and as absolute as the Court of Appeals majority found it to be in this case—the *DeVeau* Court simply could not have upheld Section 8 of the Waterfront Commission Act in light of Article XV of the Compact, which was precisely the point made by the dissenting opinion. See 363 U.S. at 163-164.

emption analysis was not based upon the existence of those hearings or the compact alone, but instead is broad enough to permit the operation of state laws—such as Section 93—designed to meet a compelling need which a State is obliged by circumstances to meet on an individual basis.

As a second consideration, it was unequivocally held in *DeVeau* that Section 504(a) of the LMRDA, which establishes federal disqualification standards for union office, does not preempt a State from adopting more stringent standards as an exercise of its own police powers. 363 U.S. at 156, 160-161. Moreover, Sections 603(a) and 604 of the LMRDA were also held to affirmatively preserve the operation of such state laws, and none of the Court's holdings with regard to the LMRDA in any way turned on the presence or absence of a congressionally approved compact. See 363 U.S. at 156-157. That being the case, and in view of the familiar canon of statutory construction that the specific governs the general, if New Jersey is not preempted from enacting and enforcing Section 93 of the Casino Control Act by the specific terms of Section 504(a) of the LMRDA, it should not be so preempted by the more general provisions of Section 7 of the NLRA.

This conclusion is reinforced by the fact that, as observed in *Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n*, 495 F. Supp. 1101, 1123 (S.D. N.Y. 1980), *aff'd in part and rev'd in part on other grounds*, 642 F. 2d 666 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981): "The LMRDA was adopted in large part because state and local authorities had failed to adopt 'effective measures to stamp out crime and corruption' [in unions] . . ." In light of this background, it would be ironic if the LMRDA itself, or any other provision of federal labor law, were held to now *preclude* state and local authorities from adopting measures to stamp out crime and corruption in unions which complement those existing by federal regulation.

As a final matter, the operation of Section 93 would not seem unduly to impair any concept of national uniformity in federal labor law. As noted earlier, the Appellants do not contend that New Jersey's disqualification stand-

ards for officials of casino labor organizations should be available to any State and applicable to any industry. Rather, it is our position that, consistent with the disqualification criteria of the LMRDA, in certain rare situations—casino gambling being one—stricter standards are permissible and do not frustrate national labor policy. 709 F. 2d at 849-851 (J.S. App. 72a-77a). As this Court itself has recognized, albeit in a Fourth Amendment context, pervasively regulated and inherently dangerous industries may for some purposes be treated as a subject apart. See *United States* v. *Biswell*, 406 U.S. 311 (1972) (firearms industry); *Colonnade Catering Corp.* v. *United States*, 379 U.S. 72 (1970) (liquor industry).

The Court should also note that application of more stringent disqualification standards to officials of waterfront labor unions has not adversely affected the nationwide application of federal labor law. Thus, there is no reason to belive that extension of the same principles to only those labor organizations choosing to associate themselves with the New Jersey casino gaming industry will do so either. As noted in Point C *supra*, legalized casino gambling represents a unique industry in this country, because of its history of organized crime involvement, its heavy and unrecorded cash flow, and its intensive dependence on employee services, all of which render the industry particularly vulnerable to corruption via labor racketeering. In view of Congress' own recognition that certain aspects of gambling required its specific attention and regulation, *see, e.g.*, 15 U.S.C. §§1171-1178 (1976) (barring interstate shipment of gambling devices); 18 U.S.C. §§1082-1083 (1976) (prohibiting gambling on certain ships); *id.* §1084 (1976) (barring transmission of wagering information by wire); *id.* §§1301-1304, 1307 (1976 & Supp. V 1981) (regulating lotteries); *id.* §1953 (1976 & Supp. V 1981) (barring interstate transportation of gambling paraphernalia), it is submitted by the Appellants that Congress would not find in Section 93 a frustration of its labor policy, nor would a holding to that effect by the Court open the floodgates to a host of similar provisions in other States and in other industries.

Turning to the question whether the enforcement of Section 93 of the Casino Control Act interferes with the jurisdiction of the NLRB, the Appellants note that since its decision in *El Dorado, Inc.*, 151 NLRB 579 (1965), the NLRB has consistently asserted its jurisdiction over labor-management relations in the casino gaming industry. *El Dorado* itself was based upon the Board's view that its supervision of labor-management relations in that industry, and Nevada's strict and admittedly valid regulations aimed in part at preventing organized crime from infiltrating gaming, were compatible with one another. 151 NLRB at 580. More recently, in *Volusia Jai Alai, Inc.*, 221 NLRB 1280 (1975), the Board reached a similar conclusion with regard to Florida's jai alai industry. In deciding to exercise jurisdiction over the relationships between the players and fronton management, the Board found that, as with the casino industry, state regulation could successfully coexist with the Board's assertion of jurisdiction, in view of the totally different aims of the state and federal controls. 221 NLRB at 1281-1282.

With specific regard to Section 93 of the Casino Control Act, that provision in no manner seeks or purports to regulate collective bargaining between casino employers and employees, or the terms and conditions of any agreements entered into between these parties, which concededly fall within the jurisdiction of the Board. What Section 93 does seek to accomplish, the removal of disqualified labor union officials, involves an area extraneous to the regulatory concerns of the Board, given its conclusion that consistent with the purposes of the NLRA, it must recognize any "labor organization" as defined therein without regard to the criminality or corruption of that organization's officers. See *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851 (1962). For both these reasons, the operation of Section 93 will not impermissibly intrude upon the jurisdiction of the Board, as may be gathered from the fact that the NLRB exercises jurisdiction over the New York waterfront despite the operation of the disqualification provisions of the Waterfront Act upheld in *DeVeau, supra*. See 709 F.2d at 851 n.26 (J.S. App. 75a-76a).

In sum, then, Appellants submit that in light of the absence of explicit direction from Congress, the minimal restriction imposed by Section 93 of the Casino Control Act on employees' freedom to choose bargaining representatives is more than justified by the State's compelling interest in minimizing corruption in its unique and localized casino gaming industry, and by the state act's complete non-interference with the jurisdiction or functioning of the Board. Under these circumstances, the application of Section 93's standards of conduct to officials of labor organizations engaged in casino gaming should be held by the Court not to be preempted by any federal statute or policy. Notwithstanding this conclusion, the specific sanctions adopted by Section 93 to enforce its disqualification standards must still be independently permissible under federal law. The Appellants assert that these penalties are indeed permissible, for the reasons which follow.

### *3. The prohibition on the receipt of dues authorized by Section 93, and imposed in this case, is not preempted by federal policy.*

As noted above, Section 93(b) of the Casino Control Act provides that a labor organization which neglects or refuses to remove a disqualified officer may be prohibited from receiving any dues from any employee licensed under the act and employed by a casino hotel (J.S. App. 247a). An order containing such a prohibition was entered by the Casino Control Commission in the present case (J.S. App. 206a-207a). It is submitted by the Appellants that the dues ban sanction is clearly not preempted by federal labor law, the touchstone for analysis being *DeVeau* v. *Braisted, supra.*

In *DeVeau,* the Court had before it a section of the Waterfront Commission Act which was almost identical in concept and operation with Section 93(b) of the Casino Control Act. The appellant, who had been convicted of a felony, was dismissed from his position as a union official when the District Attorney threatened to prosecute any-

one collecting dues on behalf of the union while the appellant remained in office. 363 U.S. at 145-146. In upholding the validity of Section 8 of the Waterfront Act against a challenge that it was preempted by federal labor law, the plurality opinion of Justice Frankfurter necessarily found that the dues-collection proscription was a permissible method of enforcing New York's union officer disqualification provision. See 363 U.S. at 152-157. *Accord, Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n*, 642 F. 2d 666, 669-670 (2d Cir.), *cert. denied*, 454 U.S. 966 (1981). This approach represented no abrupt break with precedent, for as discussed in Point D (1) *supra*, the Court in *Alabama State Federation of Labor* v. *McAdory* had unanimously concluded that a state statute which made it unlawful for a labor organization to collect dues from any member while it was in default with respect to filing certain information did not conflict with the NLRA. 325 U.S. at 456, 466. *McAdory*, of course, was decided contemporaneously with, and by the same Court as, *Hill* v. *Florida*.

Reading *Hill*, *McAdory* and *DeVeau* together, it is clear that this Court has consistently and conclusively ruled that a prohibition on the receipt of dues by a union—to enforce an obligation which a State has the right to impose—does not interfere with the performance of a union's functions so as to be preempted by federal labor law. Nor is this conclusion in any way undercut by the fact that other, more direct, methods may be available to achieve the State's goal. As observed by the Second Circuit in an analogous context in *Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n*, *supra*:

> The district court's assumption that the availability of "less drastic" measures would make it unnecessary in most cases to resort to the dues-collection prohibition, does not, however, make the prohibition unconstitutional. Although the alternative measures constitute more direct methods of achieving New York's goal of banning persons convicted of certain crimes from office in waterfront unions, it does not follow that the indirect method, the dues-

> collection provision, is either unnecessary or too drastic, given the possibility of recalcitrant union officials. If such officials, intent on retaining convicted men in office, had the support of a determined union membership, the threatened use of the dues-collection prohibition might be a more prompt and effective remedy than criminal prosecution of the union or its officers. [642 F. 2d at 671].

Based upon all the foregoing considerations, the prohibition on the receipt of dues permitted by Section 93(b) of the Casino Control Act and imposed by the Commission in this case is not preempted by federal labor law or policy.

#### *4. The ban on the administration of pension or welfare funds permitted by Section 93 is not preempted by the Employee Retirement Income Security Act.*

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.* (1976), is a comprehensive statute subjecting to federal regulation plans providing employees with fringe benefits and is designed to promote the interests of employees and their respective beneficiaries in such plans. *Shaw* v. *Delta Airlines, Inc.*, 103 S.Ct. 2890, 2896 (1983). As a by-product of its plan to protect workers' benefit programs, Congress undertook to establish benefit plan regulation as essentially an exclusive federal concern, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

To assure and achieve the realization of workers' expectations, ERISA establishes uniform standards for both pension and welfare plans, including rules governing reporting, disclosure and fiduciary responsibility. *Shaw, supra,* 103 S.Ct. at 2896-2897. Additionally, and of critical import in the circumstances of the instant case, ERISA, by virtue of criteria enumerated in Section 411 thereof, 29 U.S.C. §1111 (1976) (J.S. App. 238a-240a), prohibits persons convicted of certain conduct from holding, for a period of years, any position with an employee benefit plan.

In much the same fashion that ERISA prohibits certain persons from holding positions of responsibility and

trust with benefit plans, Section 93(b) of the Casino Control Act may operate to prevent a casino union from administering its own pension or welfare fund, if that union maintains in office persons who are disqualified pursuant to applicable statutory criteria.[17] Although the State's disqualification standards are admittedly more stringent than those imposed by ERISA, the state regulation should be sustainable using the same analysis which supports the state action in the NLRA/LMRDA context. The only complicating factor is that, unlike the LMRDA, Section 514(a) of ERISA contains an express provision which supersedes "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." 29 U.S.C. §1144 (1976) (J.S. App. 241a). The Appellants contend that Section 93(b) of the Casino Control Act does not "relate to" employee benefit plans within the preemptive contemplation of ERISA, based upon the following considerations.

First, one clear purpose of the ERISA preemption provision was to facilitate the administration of benefit plans covering employees in several different States. *Shaw, supra,* 103 S.Ct. at 2904; this purpose will not be undercut by a regulation the scope of which is, by definition, limited to one particular industry in one particular State. Second, the ERISA preemption clause is also designed to prevent state interference with the results of collective bargaining between labor and management, as expressed in the terms of a benefit plan itself, *Alessi, supra,* 451 U.S. at 525-526. But Section 93(b) in no manner affects the terms of a pension or welfare fund; it only prohibits a union from administering benefit plans if it retains in office a disqualified union official—a specific law enforcement objective wholly disparate from the general aims of ERISA. Third, the precise contours of ERISA's

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[17] In this connection, it should be noted that the Casino Control Commission declined to impose the pension or welfare fund administration ban on Local 54 in this case, see J.S. App. 208a-215a, thus the Court is presented with no application of this particular sanction on the facts herein.

preemptive effect are unclear because, as acknowledged by Justice Marshall, the term "relate to", the very criterion utilized by Congress to describe those state laws subject to preemption, "gives rise to some confusion." *Alessi, supra,* 451 U.S. at 523. Indeed, as this Court itself has recognized, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw, supra,* 103 S.Ct. at 2901 n. 21. For the same reasons noted above, to the extent that Section 93 affects benefit plans, it does so in a highly indirect manner, and one which is entirely avoidable by the action of the affected union itself.

As a final matter, Section 514(d) of ERISA, 29 U.S.C. §1144(d) (1976) (J.S. App. 245a), contains a saving clause which provides in part that nothing within ERISA should be "construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States," thus Section 603(a) of the LMRDA is not precluded by ERISA. Section 603(a) of the LMRDA—as construed in *DeVeau* v. *Braisted*—permits New Jersey to impose its own disqualification standards on officials of labor organizations engaged in the casino gaming industry. Simply put, therefore, if the State may lawfully prohibit some persons from serving as casino union officials even though federal law would allow them to serve, it follows that the State should be permitted to enforce its prohibition even if such enforcement entails some minimal difference with the terms of ERISA.

An approach similar to that advocated herein was adopted in *Local 1804, Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n,* 85 N.J. 606, 428 A. 2d 1283 (1981). In that case the court considered whether Section 8 of the Waterfront Commission Act, which mandated removal of disqualified union officials upon conviction in the trial court, was preempted by a contrary provision contained in Section 411(c) of ERISA, 29 U.S.C. §1111(c) (J.S. App. 240a), which deems a union official "convicted" only after all appeals had been exhausted. 85 N.J. at 608-

610, 615; 428 A. 2d at 1284-1285, 1288. Refusing to find the state enactment automatically barred by ERISA, the court instead balanced the degree of intrusion on federal policies and the relative importance of the federal and state interests at stake. 85 N.J. at 615, 428 A. 2d at 1288. Applying the preemption analysis set forth by this Court in *DeVeau* v. *Braisted*, the court concluded:

> Congress . . . did not intend to secure benefits for all employees by exposing workers on the waterfront to crime and corruption. Both section 8 of the compact and section 411(c) of ERISA require removal of union officers for this misconduct. Although the statutes have different purposes, they both protect employees, their unions and the public. The provision of section 8 that a conviction is effective on entry by a trial court differs minimally from the provision of ERISA that a conviction is effective only after exhaustion of all appeals. Thus viewed, section 8 does not impinge upon section 411(c) of ERISA in any significant sense. [85 N.J. at 616; 428 A. 2d at 1288-1289].

*Accord, Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n, supra*, 495 F. Supp. at 1124-1125.

In a similar manner, although New Jersey's disqualification standards for casino union officials—which can be derivatively applied to prevent a union itself from administering a pension or welfare plan—are stricter than those contained in Section 411 of ERISA, the difference is amply justified by the State's compelling interest in removing unsuitable labor officials from positions in which they can act to corrupt the gaming industry. Following the reasoning employed in *DeVeau*, as well as the *Longshoremen* cases set forth above, the Appellants submit that the ban on the administration of pension or welfare funds permitted by Section 93(b) of the Casino Control Act is not preempted by ERISA.

## CONCLUSION

**For all of the reasons set forth herein, the judgment of the Court of Appeals, holding Section 93 of the New Jersey Casino Control Act preempted by federal labor law, should be reversed.**

Respectfully submitted,

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